

1 L. Ferrara, Ph.D.

2 A. No. Not off the top of my head,  
3 no.

4 Q. I want to play you some 30-second  
5 tracks. They're just 30 seconds of songs.  
6 And I want to see if you can identify the  
7 song. I have the complete versions too. I  
8 want to see if you can identify them from the  
9 30 seconds that I have in the CD, okay? I  
10 mean, from your experience. If you can't,  
11 that is fine. I just want to find out.

12 MR. CAPLAN: I'll object to the  
13 line of questioning. You can do the  
14 best that you can.

15 MR. BRAUN: We are testing his  
16 knowledge.

17 MR. CAPLAN: Are you going to  
18 mark these as exhibits?

19 MR. BRAUN: Not right now, no.  
20 I don't have to mark them, Brian.

21 MR. CAPLAN: I'm entitled to a  
22 copy though, of what you are asking the  
23 witness about.

24 MR. BRAUN: Okay.

25 (Audio playing.)

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2 Q. Were you able to recognize that  
3 particular composition?

4 A. I don't know the name of the  
5 composition or the artist.

6 Q. I'm trying to see how to advance  
7 this.

8 I don't suppose there is a remote  
9 control here.

10 (Audio playing.)

11 Q. Same question, do you recognize  
12 the composition?

13 A. No. I don't.

14 I should ask you -- can you just  
15 shut that off for a moment -- could you be  
16 more specific about your use of the word  
17 "recognize"? In that question, do you mean do  
18 I know the specific composition from which  
19 that comes?

20 Q. Right.

21 A. Then the answer continues to be  
22 no.

23 MR. BRAUN: I've only got six of  
24 these.

25 MR. CAPLAN: Again I'd ask for a

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2 copy of each of the six at some point  
3 in time.

4 MR. BRAUN: Okay.

5 (Audio playing.)

6 A. In all of the instances so far,  
7 the style of the music sounds exactly like the  
8 radio station to which my wife has our wake-up  
9 alarm set. So I usually wake up in the  
10 morning to this kind of music every morning.  
11 To the extent I need an alarm. But as to  
12 which specific song that comes from which I  
13 may have heard one of those mornings, I can't  
14 say.

15 (Audio playing.)

16 A. Once again, a lovely example like  
17 the others of music in the jazz genre, but I  
18 can't say specially from which composition or  
19 recording that originates.

20 Q. When you say these are all in the  
21 same genre, you are including the first one as  
22 well?

23 A. I have to go back and listen to  
24 the first one. There were certainly jazz  
25 elements. I'm using jazz in the very generic

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2 sense. There are certainly jazz elements as I  
3 recall, in all of them.

4 (Audio playing.)

5 A. First, that's not in a jazz  
6 genre. And I have go back and listen to every  
7 one of them again to make sure that was the  
8 case. But I do not know the composition from  
9 which that originates.

10 Q. Okay. And then the last one.

11 (Audio playing.)

12 A. This last one is in the jazz  
13 style, and I do not know the original  
14 recording off the top of my head. That is not  
15 to say I haven't heard it before. I can't  
16 say.

17 Q. All six of those excerpts were  
18 from versions of the same song "My Favorite  
19 Things." Would you in the first instance the  
20 outcast track, would you -- or in any of those  
21 instances, would you have been of the opinion  
22 that changed the fundamental character of the  
23 song "My Favorite Things" which was originally  
24 done by Julie Andrews or performed by Julie  
25 Andrews?

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2 Q. It's "My Favorite Things" and  
3 it's from Giant Steps.

4 A. Thank you.

5 (Audio playing.)

6 A. I have heard enough.

7 Could you repeat your question,  
8 please?

9 Q. So you don't need to hear the  
10 whole thing after all?

11 A. No.

12 Q. Okay.

13 I can have her read it back I  
14 guess, but -- my question was, in your  
15 opinion, does that particular work -- would  
16 that be, in your opinion, be considered a  
17 derivative work?

18 MR. CAPLAN: I'd like to hear  
19 the entire thing.

20 (Audio playing.)

21 A. In my opinion, that represents a  
22 derivative work of the original work.

23 Q. Okay. And why?

24 A. Because in addition to the  
25 presentation of the original work and that is

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2 at the head and then at the repeat of the head  
3 sometimes called recapitulation in music which  
4 is clearly evident and obvious that it's "My  
5 Favorite Things," in the midst of -- in the  
6 middle of those two presentations of the  
7 original, you have new and in terms of artists  
8 rights again, this is the gray area, new  
9 copyrightable material. The writer of "My  
10 Favorite Things" did not write any of those  
11 improvisations. Coltrane created them. He  
12 composed them, through improvisation. And so  
13 that represents, in my opinion, new  
14 copyrightable material and in that sense, we  
15 have in this instance a derivative work to the  
16 original.

17 Q. Does the fact that all the lyrics  
18 were deleted have any impact on that opinion?

19 A. The fact that the lyrics are  
20 deleted does not impact any further or does  
21 not make my opinion different. That is, it's  
22 still a derivative work.

23 Q. In your opinion, can you cover --  
24 do you understand what I mean by cover --

25 A. I do.

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2 Q. -- so that I don't ask a  
3 foundationless question?

4 In your opinion, can a performer  
5 cover a composition instrumentally without  
6 creating a derivative?

7 MR. CAPLAN: Objection as to form  
8 of the question. Calls for a legal  
9 conclusion.

10 You can answer.

11 A. I have to answer it in two parts.  
12 The first is that hypothetically I would say  
13 yes, one certainly could create a cover, an  
14 instrumental version of a song like "My  
15 Favorite Things" and without the lyrics and  
16 perform it identically to the original. And  
17 the point of your question was -- would that  
18 be --

19 Q. My question was, can a performer  
20 cover a particular composition instrumentally  
21 without creating a derivative?

22 MR. CAPLAN: Same objection.

23 Q. In your opinion.

24 A. This is getting into the  
25 intricacy of the law that I don't have

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2 sufficient expertise in. So, I'll once again  
3 answer it in two ways. The first is to say:

4 Yes, I think that if one were to  
5 provide an instrumental version, an  
6 instrumental cover without the lyrics, that  
7 that might not be a derivative work. But I  
8 can't say for sure. I really don't have an  
9 opinion. It's simply too much involved in  
10 legalese for me.

11 The second part of it is that to  
12 the extent that the message of those original  
13 lyrics has been deleted, then I wonder, again  
14 not being a lawyer --

15 Q. Well that's why -- you're getting  
16 to why I asked the question, but go ahead.

17 A. I wonder why -- I wonder whether  
18 the fundamental character of the original  
19 song, which includes lyrics and melody, music  
20 lyrics and music, has not be changed. Because  
21 that message of the, you know, of the original  
22 song, of the original composition includes  
23 both lyrics and music. So I would have to  
24 wonder whether that were the case.

25 Q. Do you have any knowledge of the